To: House Constitution Subcommittee

From: Charles Tiefer

Re: Response to Post-Hearing Questions

1) **Q)** Would the precedent of the Jefferson warrant, if it stands, open the door to Congressional offices and all of their correspondence, calls, notes, memoranda, and computer hard drives being subject to any local law enforcement if local law enforcement or prosecutors found a sufficiently ambitious local judge?

   A) Yes

2) **Q)** If this precedent stands and the local law enforcement attempted a congressional office raid with significant numbers of officers and used the FBI approach of bringing their own locksmith during non-business hours when virtually no one was present who had the time or ability to legally challenge a state, district, county, or even city warrant, how could the Capital Police respond if threatened with jail themselves by the local authorities?

   A) Too ugly a scene, legally, to think about.

3) **Q)** Since the warrant in the case at hand was a common form in which the judge made no orders or requirements that privileged documents or material be kept confidential or safeguarded, does that make the warrant facially unconstitutional since the affidavit made clear that Constitutionally protected material would likely be encountered?

   A) Yes

4) **Q)** If you were a new FBI Director who was frustrated by Congressional questions, oversight, and threatened oversight of your new internal policies and new surveillance efforts and decisions, what would be the most intimidating things you could do to Congress and its members to make them back off of their oversight?

   A) Pick a vulnerable Member and ruthlessly make an example of him or her.

5) **Q)** If congressional lawyers are to perform the sifting of documents instead of Executive Branch lawyers, then is law enforcement simply at the mercy of trusting congressional lawyers to hand over ALL documents called for in a subpoena?
   - Does your opinion change if congressional lawyers have incentive to protect the Member?
   - Is this fear allayed by having a bipartisan group of congressional lawyers sort through the documents, to make sure law enforcement is given the documents it is entitled to, but not the documents it is constitutionally forbidden from seizing?

- Are their any concerns with having lawyers perform the sorting that have incentive to ruin a Member? If so, what would be the safeguards against such incentives?

A) Teams of Congressional lawyers have sifted documents, for turnover, for my 3 decades and more. As teams of professionals aware of the common ethical and legal issues, we are no more prone to cover up for Members than teams of doctors are to catch their patients' infections. What the questions say about bipartisan lawyers, and incentives, etc., explains why there is a House Counsel's office to supervise such matters, and, in turn, majority and minority leadership counsel who provide high-level policy guidance to the House Counsel.

6) **Q) U.S. v Brewster**: Held that the Speech and Debate Clause protects Members of Congress from inquiry into legislative acts or the motivation for performance of such acts, but does not protect all conduct relating to the legislative process. The Court held that the Clause does not prohibit inquiry into activities that are casually or incidentally related to legislative affairs but not a part of the legislative process itself.
   - Do your views on the Speech and Debate Clause comport with US v. Brewster?
   - Does Brewster support what the Department of Justice did on May 20, 2006 when it raided a congressional office?
   - Do you believe that a judicial remedy and procedure should be pursued or a compromise procedure established between the Congress and the executive branch?

A) Brewster supports my view, in criticism of the raid. DOJ may prove a bribery case, but without intruding in legislative materials. It may obtain what it needs to prove a bribery case by subpoena, rather than by the privilege-intrusive means of the raid. Having said that, I prefer a compromise procedure, among many reasons, one of which is that the Congressional side of the negotiation will focus on the interests of the chamber as a whole, not on the case-related interests of the individual Member nor on the peculiarly case-focused attention of the involved prosecutors.

7) **Q)** Isn't it true that it is not the Congress member's office and its contents that the founders sought to protect, but rather they were seeking to protect the people's material, their needed oversight and legislation that the Congress member was pursuing, and the founding effort was to keep the people's business from being derailed by executive intimidation?

   A) Precisely correct.

8) **Q)** Does it hinder law enforcement's ability to effectively investigate potential crimes committed by Members of Congress if officers have to go through the Speaker, the House Counsel, or the House Ethics Committee before searching for and seizing documents from a Congressional office? Have there been any criminal cases in the last 219 years that have been harmed or impeded by the observance of Constitutionally privileged material being within a Congressional office?

A) It does not hinder them. I have neither myself witnessed, nor otherwise learned, of any case harmed or impaired by observance of appropriate procedures and privileges as to Congressional offices. On the contrary, I have myself been involved in many cases which went ahead smoothly, through charging, to conviction, acquittal, or dismissal of the charges, following the established procedures such as subpoenas for material in offices.

9) **Q)** Would the protections afforded under the Speech and Debate clause also apply to Congressional offices within a Member's state district?

A) An interesting question. Field offices tend to handle more non-privileged casework and less privileged legislative work – but some, still – compared to main offices in Washington, D.C. The case law about privilege and field offices is thus mixed, traditionally. And, there is less of a sense of intrusive intimidation – but some, still in relation to what occurs in field offices. On the other hand, privilege is privilege, and, there is some legislative privileged material in field offices. A good deal depends upon how that particular Member allocates responsibilities. Some Members arrange a mix of work for their field offices that involves relatively more involvement in legislation; some, relatively less. Moreover, the rapid evolution and diversification of Members' offices' computer systems means that I do not myself have a thorough empirical picture for how much field offices' computers these days contain legislative material apart from the specific legislative work they do. Thus, it is a hard question to answer in the abstract, and, it is the kind of question that tends to be left unresolved until a concrete case arises. If a compromise agreement about warrants left unresolved the issue of field offices, I would not be critical. While that may sound unsatisfying, it is consistent with the law in the past about field offices, which is relatively inconclusive compared to the clarity of the law about, say, committee offices.

10) **Q)** If the Speaker himself were under investigation, what procedure would still give law enforcement a means to pursue alleged corruption without the case being thwarted? Haven't Speakers themselves been investigated in the past without violating the Speech and Debate protections?

A) I was around through the investigations and the ethics proceedings on Speaker Wright and Speaker Gingrich. There was little sign that they had any power to thwart outside prosecutorial investigation. Obviously there was some reluctance to challenge them among some Ethics Committee members, although there was also, often, independence and objectivity. Moreover, this was handled in both those instances by having special counsels.

11) **Q)** Has the Constitution given either the Executive branch or the Judiciary the heightened protections that the Speech and Debate clause afford to the Congress?

A) No. The Executive has tools in relation to prosecution such as the pardon power and the appointment power. The Judiciary has lifetime tenure and salary protection. The Framers gave Speech or Debate only to Congress out of a historically attuned sense that legislators most specially and alone needed that privilege.

12) **Q)** Under Article 1, Section 5 of the Constitution, doesn't the House have authority to discipline its own members and formulate rules to do so, including locking them out of their offices, taking materials from their offices, otherwise disciplining members, and even expelling them from Congress? Couldn't the House make a rule to punish or discipline a member if the member failed to respond to a lawful subpoena?

A) There is a respectable argument, but there are counterarguments too, about the extent of the House's authority to punish or discipline a member for his response to a subpoena. On the one hand, the House does have authority to discipline, and, this may furnish an appropriate reason. On the other hand, in the Powell v. McCormick case, we saw that there are some limits on the treatment to be meted out to individual Members, particularly those who for some reason, such as being in a racial minority, were not (at that time) perceived as being fairly treated by a majority of the body. The Supreme Court opinion in the Powell case discusses in detail the Framers' familiarity with the case of John Wilkes of Parliament (source of the cry, "Wilkes and Liberty!"), who won out in a long struggle despite the House of Commons's repeated efforts to boot him, and the Court gave the strong impression that the Wilkes case shapes the limits on what can be done with the disciplinary power.

I do firmly believe the House can adopt rules, as it has, governing response to subpoenas – and it can enforce them, when it proceeds fairly. Also, I do firmly believe that the party of a Member who has been charged, or who has otherwise been subjected to a formal instrument involving probable cause of charges, can have that Member suspend their committee membership. This has been done with charged Members in the past, and, of course, with Rep. Jefferson. Note, though, that the House has withheld expulsion proceedings, even for charged Members. I would be cautious about questions that ask about expelling members in a context where, however unpopular they may be with a majority of the body, and even when resisting documentary process, they may be exercising appropriately a privilege conferred by the Constitution upon them individually. That is precisely what the Wilkes case, and its discussion by the Supreme Court in Powell, cautions about.